DOCUMENT RESUME

ED 339 100 EA 023 470

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TITLE Administration and the Law: An Alternative View.
PUB DATE Jun 91
NOTE 20p.; Paper presented at the Annual Meeting of the Canadian Association for the Study of Education (Kingston, Ontario, June 2-5, 1991).
PUB TYPE Speeches/Conference Papers (150) -- Viewpoints (Opinion/Position Papers, Essays, etc.) (120)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Altruism; Discipline Policy; *Educational Administration; *Educational Policy; Elementary Secondary Education; Ethics; Foreign Countries; *Laws; Legal Problems; *Legal Responsibility; Policy Formation; Student Placement; Teacher Dismissal
IDENTIFIERS Canada; *Positivism

ABSTRACT

An altruistic rather than positivist view of the law as it applies to educational management is proposed in this paper. The altruistic interpretation views the law as a mediator that promotes moral and ethical principles, as opposed to the traditional positivist view of law as an instrument of power. The value of an altruistic conception of the law is illustrated by examples in three areas of educational administration: student discipline, teacher dismissal, and student placement. A conclusion is that the altruistic interpretation of law is of greater benefit to educators than the positivist approach in that it utilizes the law as an ally, offers flexibility and tolerance, and is person-oriented. The recommendation is made for educators to take action by reviewing court rulings and developing policies and practices that can be supported by the courts. (26 references) (LMI)

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Administration and the law: An alternative view

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A paper presented to the Canadian Society for the Study of Education, Kingston, Ontario, June, 1991.

EA 023 470

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Given the current impact of the law on educational policy making (Dickinson & MacKay, 1989; Sussel & Manley-Casimir, 1986), it is time educators re-examined their traditional positivist philosophy of the law. Educators need to adopt an 'altruistic' philosophy which sees the law as helping to define 'what ought to be' rather than 'what is'. An altruistic view involves "the creation and development of values, not just the more efficient attainment of what we already have" (Kennedy, 1976, p. 1772). Altruism denies the bureaucrat the "right to apply rules without looking over his shoulder at the results" and substitutes standards for rules, thereby avoiding "individualist certainty-through-rules" (Kennedy, 1976, p. 1173).

Based on these premises, this paper argues that the law occupies a strategic location in the rationalization of society, but not simply as an instrument of the exercise of power. It also suggests that the narrow, positivist interpretations of the law as an instrument of power and interest leads to the law being used as a means for developing, implementing and enforcing rules and regulations which make schools more rationalized and bureaucratized (Bates, 1990, p. 33; Wise, 1977). The positivist approach gives the bureaucrat the right to be a simple rule maker, where "rules are defined as directives whose predicates are always fact and never values" (Kennedy, 1976, p. 1770). It suggests that the positivist view leads to educational

management becoming that of rule making and enforcement couched in the protection of 'the law is the law'.

In contrast, the law must not be viewed simply as a "one-way street through which the instrumental interests of the powerful are imposed on the powerless" (Bates, 1990, p. 33). Rather, through the law, power is constrained by cultural and ethical principles which demand that the law impose restrictions on the untrammeled deployment of power (Bates, 1990, p. 33). Viewed in an altruistic manner, the law may be seen as a vehicle whereby students, teachers, and members of the public can be assured of being treated in a fair, open, and honest manner through policies which have been developed, enacted and enforced on the understandings of what constitutes the doctrine of 'fairness'. Educational management in this view involves developing and implementing policies based on standards reflecting cultural and ethical principles which all actors can support. Altruism denies the right to apply rules without looking over your shoulder at the results (Kennedy, 1976).

The Positivist View

The view of society from the positivist perspective is such that there are discoverable laws within society which can be formulated and applied equally and consistently in every situation. This view of the existence of 'natural laws' is, for the administrator, the answer to control since it provides a clear, legitimate means of imposing his reality

upon his subordinates. It rests in the "fundamental postulate of positivism - that law must be strictly severed from morality" (Fuller, 1985a, p. 453).

From the positivist viewpoint, educational leadership may be best understood through adopting the Diceyean notion of the "Rule of Law". Such a notion rests on a highly simplistic view of the world - one which sees the world as clearly ordered and structured with everyone and everything having its place and its function. The courts are seen as impartial arbitrators of all disputes as they watch over society from their sacred position at the apex of the societal pyramid. Ultimately, the "Rule of Law" is impersonal, impartial, and rule bound. Discretion is its antithesis (Fuller, 1985b, p. 187). The central theme is that of "abstract regularity" (consistent, objective, reasoned, and rational application of the rules in all circumstances).

The consequence of viewing the law from the positivist perspective is, thus, a reinforcement of the view of administration as a 'science'. Such a view reinforces the notion that the means of control rests in rules and that the right of rule development and enforcement rests in the bureaucrat via the 'Rule of Law'. The answers to problems are simple from this perspective - create and apply rules. In this approach, 'the law is the law' and acts as an instrument of power and interest. It is the means by which the administrator imposes his/her will on staff, students,

and parents. Court rulings become the justification and the vehicle for more rules.

Weaknesses of the Positivist View

The simplistic, positivist view of the law as a means of control by administrators, school boards, and departments of education is dysfunctional. One dysfunction is that of dehumanization. The Rule of Law taken to its ideal through the notion of 'abstract regularity' and 'the law is the law' (Hart, 1985, p. 447) leads to the application of the law in a dehumanized, technically perfect bureaucracy by Weber's ideal bureaucrats. Such an approach to the law in education leads to its unthinking application as illustrated in the unilateral decision by the Ontario Minister of Education in Evershed (unreported, cited by Anderson, 1985, p. 19). In this case, the Minister of Education chose to cancel Evershed's teaching certificate without a hearing. She argued justification for her action on the basis of Ministerial discretion and further, that, even with a hearing, the result would have been the same.

A second dysfunction of this approach is illustrated by Wise's (1977) notions of bureaucracy, rationality, and hyperrationalization. Wise suggests that courts are not only requiring faults they have found be corrected, but they are starting to specify the criteria which the remedy must satisfy. This has resulted in more proceduralization of actions to accomplish ends which have, in the past, been

accomplished by informal means. In turn, there is a reduction in personalized relationships and rules become 'ends' in themselves rather than 'means'.

Third, the increased proceduralization leads to increased bureaucratization, reinforcing the notion that control must be exercised over all parts of the organization to ensure that everyone is doing what they are supposed to be doing. Increased control is typically achieved through additional rules, in this case, rules built upon the rulings of the courts. The result is that administration justifies the new rules and policies on the basis that they are required by the legal system. Van Geel (1988) suggests that this is a form of passing the buck, "it may open the door to other opportunities and/or eliminate a nagging political problem, with the courts serving as handy scapegoats" (p. 645). Schonberger (1986), in discussing the effects of bureaucratization, suggests that because "they (teachers) are expected to keep order and to follow administrative instructions ... they become passive and sterile receptacles for the dictates of remote power figures" (p. 9).

If the narrow positivist perspective of the law is dysfunctional, an alternative view is necessary. Such a view may be labelled altruism. Altruism sees the law as much less directive and intrusive. Rather, from the altruistic perspective, the law is seen as promoting moral and ethical principles. The law is seen as a means by which administrators and boards of education can develop

organizational practices and structures which promote the well-being of students, teachers and other stakeholders through the notions of fairness and caringness.

An Altruistic View of the Law as Mediator

Thompson (1985) sets the tone for an altruistic view of the law as mediator:

> If we assume that the law is no more than a mystifying and pompous way in which class power is registered and executed, then we need not waste our labor ... (but) It is because law matters ... not only from the standpoint of those ... oppressed, but also according to some ideal notion of the standards to which "the law", as a regulator of human conflicts of interest, ought to attain. (p. 1060)

This view of the law suggests that the simple mechanistic enacting and enforcing of policies and rules which act to ensure compliance is not sufficient. There must be some aspiration toward ideal beliefs, values, and practices which recognize and "reconcile the interests of all degrees of men" (Thompson, p. 1060). Van Geel (1988), in a discussion of the courts and education, suggests that, "in short, by one mechanism or another, the values and ideals announced by the courts may become the standards by which school officials come to judge their own behavior" (p. 645).

It is these values, beliefs, and ideals that an altruistic view of the law as a 'mediator' promotes. In this view, the law does not constrain administration but, rather, it encourages administration to develop policies and regulations which are, as far as is possible, person-oriented rather than control-oriented. In order to illustrate the

value of an altruistic conception of the law, the following discussion provides illustrative examples in three areas where courts have defined how leadership 'ought to function' (altruistic) as opposed to how 'it does function' (positivistic). Specifically, these areas are student discipline, teacher dismissal, and student placement.

Student Discipline

Historically, students were subject to the discipline of the school through the doctrine of 'in loco parentis'. This doctrine dictated that students were subject to the discipline of the master in whatever form that discipline might take provided that it was not administered in excess or for some personally gratifying reason. Questions of 'fairness' were considerations which the master was not required to consider. However, several American cases came to the forefront in the late 1960's and in the 1970's which marked a dramatic change in the way students were to be treated. These cases, beginning with Tinker (1968), developed the doctrine that students and teachers do not shed their constitutional rights at the schoolhouse door. Another such case which has received widespread attention in both United States and Canada is Goss (1975). This case illustrates the need for administrators to develop discipline and other student policies from an altruistic view which will work to ensure that such policies reflect constitutional ideals.

Goss (1975) involved the suspension of nine high school students for a period of ten days without a hearing. This suspension was in accordance with the governing Ohio statute which gave principles the authority to make such suspensions at their discretion. The students were suspended for taking part in demonstrations during a period of widespread student unrest. The United States Supreme Court ruled that students have interests qualifying for protection of the Due Process Clause. Thus, a student must be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have, and an opportunity to present his side of the story. The Due Process Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school. The Supreme Court justices stated that they did not believe they had imposed any procedures which were less than a fair-minded school principal would impose on himself in order to avoid unfair suspensions. (Contrast this situation to Haberstock (1971) where a vice-principal slapped a student's face, chipping his tooth, for a misdeed which, in fact, the student had not committed. In the ensuing court case the vice-principal was acquitted - his actions were found to be reasonable).

In his discussion of Goss (1975), Kirp (cited in Evans et al, 1989) suggests that the decision is about the possibility of empathy - that there is a possibility that

both students and disciplinarians will hear each other out. He says this decision:

> Aspires to increase reliance on nonformal nonadversarial procedures, to encourage a kind of collegiality - actual exchange and even negotiation, leading to mutually acceptable outcomes or at least shared understandings - in a system which has treated fiat as an administratively convenient rule of thumb ... individuals are entitled to have some control over events that ultimately shape their lives, and that this control can be meaningful only if they are permitted to reveal their version of the truth, and to know in the end what has happened to them and why. (p. 69)

This case illustrates the need for administrators to adopt a different view of the application and function of rules. While rules may be necessary for the proper functioning of a school, they must be developed and applied without the arbitrariness and rigidity usually characterizing their development and application. Rules should encourage students to assume responsibility for their actions, give them some measure of control over what happens to them, and, when they break the rules, give them an opportunity to be heard. (For example, see Taylor (1985) where the court ruled that the school board drug abuse regulations were to inflexible.)

Teacher Dismissal

Decisions to dismiss or suspend teachers also involve an application of rules. To often, the courts have reviewed such decisions and quashed them as a result of the application of the rules in an arbitrary fashion. Personnel policies and practices, like student policies and practices,

must treat the teacher as a person with basic human rights. Personnel policies should recognize that the teacher is a professional who has a right to some control over the rules and policies that affect his/her everyday working life. Rowbotham J., in Gazdarica (1986), comments on the seriousness of the decision to dismiss a teacher: "The consequences of the appellant's dismissal as a professional person are not to be viewed lightly", and, "a high standard of justice is required when the right to continue in one's profession or employment is at stake" (p. 16).

Anderson (1985), commenting on Evershed (1985, unreported), suggested a developing trend that, "unilateral decisions without consultation, especially when an individual's rights are affected are abhorrent to most, if not all, of the Canadian judiciary" (p. 20). A Saskatchewan case reflecting this trend is Collins (1988). In this case, a principal was served notice that he was to be demoted. The demotion occurred without Collins receiving an adequate opportunity to respond. In a reaction to the case heard at the Saskatchewan Court of Queen's Bench level (later heard at the Appeal level), Cramer (1987) stated that, "a school board here is having trouble learning that it cannot demote a principal until it has given him a fair opportunity to answer the charges against him." (Also see Knight (1990) and Rainbow (1990) for extensive discussions in the dismissal area).

It is not that the courts are requiring any action that can be considered unreasonable, unduly taxing, or costly on

the part of school boards. It is a matter of school boards understanding that teachers are not in an employment relationship with their board which can be considered one of 'Master and Servant' where the board is free to dismiss a teacher with or without reasons. The basic requirement is that school boards observe the requirements of natural justice as first set out in the ruling in Nicholson (1979) by the Supreme Court of Canada:

> The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. (p. 17)

What is required, therefore, is that school boards develop personnel practices which are carefully designed and carried out in a manner which ensures fair process for teachers. Given the potential negative consequences for teachers, students, employer-employee relations, and community relations, it is paramount that a narrow, rigid viewpoint of teachers as subject to the whims of employer boards be avoided. Personnel practices, particularly evaluation policies and procedures, must be developed from an altruistic view, taking into account notions of 'fairness' and human rights.

Student Placement

The third area illustrating the need for an altruistic view of the law rests with student placement. In

Saskatchewan, for example, handicapped children between the ages of three and twenty-one have a right to a least restrictive program. Hurlbert and Hurlbert (1989) state this as: "What is meant by least restrictive program is a program most appropriate for the student which doesn't restrict unnecessarily that student's rights. Thus, the least restrictive environment feasible is the regular classroom" (p. 70). However, it has often been the practice of school districts to decide arbitrarily on the placement of a child in a special setting or in a regular classroom or not at all without consultation with parents or teachers. Such decisions have generally been made on the basis that school boards and their administrators have the legal right to make such decisions with or without input. The following cases indicate the need for school districts to take a much more altruistic view and not make decisions without consideration of their impact on children, parents, and teachers. They also indicate that if school districts do not consider these impacts, the courts will.

In Carriere (1984, unreported, cited in Hurlbert & Hurlbert, 1989, p. 71), a ten year old cerebral palsy victim, Shelley Carriere, was 'excused' from attending school by school authorities because a suitable school accomodation was not available for her. However, the Judge ordered the school board to accept Shelley into their school system or provide her with required funds to attend a suitable school in another division.

In a New York case, Hoffman (1979), a child with normal intelligence was placed in a class for the mentally retarded on the basis of his performance on the Stanford-Binet Intelligence Test. The test placed him at a 74 intelligence quotient; the cutoff for regular class placement was 75. The clinical psychologist who tested Hoffman recommended that he be re-evaluated in two years. This never occurred and Hoffman remained in the class for mentally retarded children for eleven years. His mother, a single parent, was never informed of the testing or the placement. In the resulting lawsuit, educational malpractice was not supported by the courts. However, because of the involvement of the medical profession, medical malpractice was found.

Ruff (in Dickinson & Mackay, 1989) makes a strong case against segregation. In doing so she states that:

> Many school boards however refuse to allow a child with a mental handicap into the regular classroom ... Parents no longer approach the school board alone, where it is so easy to be outnumbered, intimidated ... An advocate always accompanies the parent. (p. 266)

There is no easy solution to the problem of educating the handicapped. However, education officials and parents will achieve much greater benefits for children if they are willing to mediate differences rather than solve them through the adversarial system where someone must lose and someone must win. It is clear, however, that the courts are prepared to step in where school districts have failed or refuse to exercise their mandates in a fair, judicious manner involving parents, children, and teachers. Mackay (in Dickinson &

Mackay, 1989) states in his discussion of the Ellwood (1987) case that:

> Looking at the equality provision (of the Charter), it is quite clear to us that the right to education had to (be) equally delivered to the disabled ... Section 15 specifically indicated that there is to be no discrimination based on mental or physical disability. (p. 276)

Conclusion

The three categories of examples reviewed in this paper provide a limited illustration of the necessity for school officials to re-examine their organizational practices and begin viewing the law from an altruistic point of view. Such a point of view will encourage educators to see the law as an ally and as a mediator of disputes rather than seeing it as imposing a need for more rules and regulations which, in effect, tighten boundaries in an attempt to protect the bureaucracy from assailing forces. It will allow school officials the flexibility, empathy, and tolerance achieveable through the use of standards and cooperation rather than the rigidity, alienation, and conformity achieved through the use of rules and coercion. In a time of growing judicial involvement in education, school officials should see court rulings as assisting in developing procedures and guidelines which will make their systems more person oriented rather than seeing the rulings as a costly and time consuming interference with their mandate.

This does not suggest that more judicial involvement in education is desired. What it does suggest, however, is that

if courts become involved then an altruistic view of the rulings is of much greater benefit than is the traditional positivist view. Bell (1990) provides a challenging view of the future of the courts' involvement in education:

> In the next decade, with the continued primacy placed upon education in modern society and the ever-increasing volume of education litigation, our courts will of necessity be forced to reconsider their traditional reluctance to challenge the actions and decisions of school authorities. (p. 8)

If educators are willing to adopt an altruistic view of the law, however, this should not strike fear into their hearts. It should mean that they have reviewed court rulings to date and have developed policies and practices to achieve ideals, beliefs, values and standards which the courts can and will support, rather than arbitrary rules which the courts cannot support. Mackay (in Dickinson & Mackay, 1989) leaves us with an optimistic view by suggesting that educators still have the opportunity to address their own problems:

> There is still time for educators to put their own houses in order, before the courts require them to do so. A careful in-house review of rules, procedures and penalties may prevent legal action and give educators a greater sense of being in control of their own destiny. Action is better than reaction. (p. 299)

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